No. 78-838

In the Supreme Court of the United States

OCTOBER TERM, 1978

HOSPITAL AND INSTITUTIONAL WORKERS LOCAL 250, AFL-CIO, PETITIONER

v.

MERCY HOSPITALS OF SACRAMENTO, INC., AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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Petitioner contends that, in refusing to enforce a National Labor Relations Board bargaining order, the court of appeals improperly relied on an argument that respondent hospital failed to raise in a timely manner before the Board.

1. In August 1974 Congress amended the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, to cover persons employed at health care institutions, including nonprofit hospitals. 88 Stat. 395. Petitioner immediately filed with the Board four petitions for representation elections. The union sought certification as the bargaining representative for two employee units at each of respondent hospital's two locations. During the ensuing representation proceeding, petitioner and respondent hospital stipulated that there should be separate employee

units for service and maintenance personnel, on the one hand, and clerical employees, on the other. The parties disagreed about whether the bargaining units should include employees at both hospital locations. Petitioner advocated separate units at each location, whereas respondent hospital contended that each unit should contain employees from both locations (Pet. App. A-2).

The Board's Regional Director accepted the stipulation regarding the composition of the bargaining units and decided that the proper geographical scope was employer-wide. Petitioner sought review by the Board, and the Board heard the case in conjunction with five related cases on the proper composition of bargaining units in the health care industry. The Board's notice of hearing made it clear that the Board was concerned with which unit or units should embrace the various kinds of clerical employees in the industry (Pet. App. A-3 & n.1). After hearing and argument, the Board sua sponte rejected the parties' stipulated all-clerical bargaining unit. The Board determined that those clerical employees actually working in patient care areas of the hospital shared a community of interest with service and maintenance personnel and therefore should be included in the same bargaining unit (Pet. App. A-45 to A-47). Accordingly, the Board concluded that one bargaining unit should consist solely of business office clerical employees and another should include service and maintenance personnel, as well as the remaining clerical employees. Respondent hospital did not object to this modification of the stipulated bargaining units, nor did it file a request for reconsideration, as it could have done under 29 C.F.R. 102.65(e)(1).[1]

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[1]Section 102.65(e) of the Board's rules, 29 C.F.R. 102.65(e), provides, in relevant part:

> (1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision for reconsideration or rehearing * * *. A motion for reconsideration shall state with particularity the material error claimed * * *.
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> (3) * * * A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

Section 102.67(f) of the rules, 29 C.F.R. 102.67(f), provides that: "Failure to request review shall preclude [the] parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding."

Petitioner withdrew its petition for representation of the business office clerical employees and participated in the election for the service and maintenance unit. Petitioner won the election, and respondent hospital filed objections. None of these objections concerned the Board's modification of the stipulated bargaining units. The Board's Regional Director overruled the hospital's objections and certified petitioner as the bargaining representative for the service and maintenance unit. The Board denied the hospital's request for further review (Pet. App. A-3).

Petitioner then requested respondent hospital to bargain, and the hospital refused. The hospital stated that it would not bargain because the Board altered the bargaining units described in the parties' stipulation and thereby departed from its ordinary practice of honoring such stipulations as long as they do not violate express statutory provisions or established Board policies.[2] Petitioner filed an unfair labor practice charge based on respondent hospital's refusal to bargain. The Board's General Counsel issued a complaint, and the Board found that all the issues raised by the hospital, including the modification of the stipulated units, were or could have been litigated in the underlying representation proceeding and therefore could not be raised as a defense in the unfair labor practice proceeding (Pet. App. A-4).

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[2]See *The Tribune Co.*, 190 N.L.R.B. 398 (1971).

Moreover, the Board determined that no different result was required by *Otis Hospital, Inc.*, 219 N.L.R.B. 164 (1975), a case decided by the Board several months after its decision in the representation proceeding in the present case. In *Otis* the Board announced that its general policy of accepting stipulated bargaining units would apply to the health care industry. In the unfair labor practice proceeding against respondent hospital, the Board stated that *Otis* could not justify the hospital's refusal to bargain because, at the time of the representation decision in this case (Pet. App. A-29 to A-61), no party could have known what the Board's policy was with respect to the appropriate bargaining units in the newly-covered health care industry and therefore it could not have been determined whether the parties' stipulations conformed with established Board policies (Pet. App. A-16 to A-17). Accordingly, the Board concluded that respondent hospital's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). The Board ordered the hospital to cease and desist from its unfair labor practice and to bargain with petitioner union upon request (Pet. App. A-24 to A-26).

When respondent hospital persisted in its refusal to bargain, the Board sought to enforce its order in the court of appeals. The court denied enforcement of the Board's order and remanded the case for reconsideration (Pet. App. A-1 to A-9). The court held that respondent hospital was not foreclosed from contesting the alteration of the stipulated units in the unfair labor practice proceeding, because Section 102.65(e) of the Board's rules "speak[s] in discretionary, not mandatory terms," and provides that a motion for reconsideration is "not required in order to exhaust administrative remedies" (*id.* at A-8 to A-9). In addition, the court stated, "[c]ertain representations were made during the oral argument which lead us to believe that, under the peculiar circumstances of this case,

making a motion for reconsideration would have been a futile act" (*id.* at A-9). With regard to the merits of the unit determination, the court held that, although the Board's use of the community of interest doctrine "is entirely proper in those cases where the appropriate bargaining unit is disputed," reliance on that doctrine "is insufficient to override the intent of the parties in making a stipulation," because the doctrine "is not one of the settled Board policies which justify a refusal to accept a stipulation" (Pet. App. A-7).

2. The only question presented by the union's petition is whether, under the Board's rules, the hospital's failure to seek reconsideration of the Board's unit determination in the representation proceeding foreclosed it from challenging the Board's alteration of the stipulated units in the subsequent unfair labor practice and court review proceedings. We agree with petitioner that the court of appeals erred in construing the Board's reconsideration rule as permissive rather than mandatory; the court of appeals' interpretation is contrary to this Court's interpretation of a similar provision in *International Ladies' Garment Workers' Union* v. *Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3 (1975).[3] The Board did not file a petition for certiorari, however, because the court of appeals' decision may be viewed as limited to the "peculiar circumstances of this case" (Pet. App. A-9).[4] Cf.

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[3]There, the Court held that the employer's failure to file a petition for reconsideration of the Board's decision in an unfair labor practice proceeding foreclosed judicial review of a contention that could have been raised in such a petition. Section 102.48(d)(1) of the Board's rules, 29 C.F.R. 102.48(d)(1), authorizes petitions for reconsideration in unfair labor practice proceedings just as Section 102.65(e)(1) authorizes such petitions in representation proceedings.

[4]Respondent hospital cites *NLRB* v. *Annapolis Emergency Hospital Ass'n.*, 561 F. 2d 524 (4th Cir. 1977) (en banc), as another case in which the court of appeals permitted an issue to be raised in an unfair labor practice proceeding, even though the same issue could

NLRB v. *International Brotherhood of Teamsters, Local 70*, No. 77-3242 (9th Cir. Aug. 7, 1978) (judicial review of due process contention foreclosed because union "failed to raise this issue before the Board through a motion for reconsideration pursuant to 29 C.F.R. §102.48(d)(1)," citing *Quality Manufacturing Co., supra*). But, should the Court grant the present petition, the Board will defend its decision and order.

Respectfully submitted.

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have been, but was not, raised by motion for reconsideration in an earlier representation proceeding. *Annapolis* is distinguishable from the present situation, however, because the court of appeals found that the hospital there *did* sufficiently raise the issue in the representation proceeding and that, in any event, "the Board's error was a purely legal one, so basic in its nature that §10(e) [*i.e.*, 29 U.S.C. 160(e)] has no application" (*id.* at 526). (The court of appeals in *Annapolis* held that the Board exceeded its statutory authority by certifying a bargaining agent on the condition that it not bargain but delegate absolute bargaining authority to another entity (*id.* at 528).) Here, by contrast, it is undisputed that respondent hospital did not object to the Board's modification of the stipulated units in the representation proceeding. Furthermore, notwithstanding the court of appeals' characterization of a motion for reconsideration as "a futile act" under the circumstances of this case (Pet. App. A-9), it is at least possible that the Board would have reached the conclusion it reached in *Otis* in this very case if the parties' stipulation concerning the composition of the bargaining units had been emphasized in a motion for reconsideration after the initial decision in the representation proceeding.

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